

November 5, 2003

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VIA FACSIMILE AND ELECTRONIC MAIL

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Re: Waste Discharge Requirements ("WDR") ("Tentative Order No. R9-2003-0228") and Cease and Desist Order ("CDO") ("Tentative Order No. R9-2003-0285") for California Department of Parks and Recreation ("DPR"), Crystal Cove State Park, El Morro Trailer Park ("EMTP"), Orange County

Dear Brian:

Although we have not yet received San Diego Regional Water Quality Control Board ("SDRWQCB") staff's response to comments regarding the draft El Morro Orders, we request that the following be considered and made part of the written record submitted to the Regional Board. As described below, and after our meeting with RWQCB staff we are of the opinion that these draft orders are at best unsupported by findings of fact and at worst both arbitrary and capricious in their requirements. EMCA's experts will explain their conclusions in further detail as part of their live testimony before the Regional Board next Wednesday and recommend that these draft orders be remanded back to staff for further consideration. Alternatively, if the Regional Board were to order the Department of Parks and Recreation to hook up El Morro Village to the existing sanitary sewer, the residents of El Morro Village would agree to pay for all reasonable costs related thereto.

1. WATER QUALITY (CDO) ISSUES

- (a) The draft CDO prepared by Regional Board Staff does not conclude that the systems are failing.
- (b) There is NO evidence that the EMTP systems are impacting surface water.
- (c) There is NO evidence that the EMTP systems are impacting ocean water.
- (d) There is NO evidence that there is any "receiving ground water" of sufficient quantity and suitable quality to require protection pursuant to the Basin Plan east of the Pacific Coast Highway.
- (e) The "receiving ground water" west of the Pacific Coast Highway is sea water and not suitable as a Municipal, Domestic or Agricultural Source.

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Therefore, unlike the Crystal Cove Cottages case, there is no Water Quality basis for the CDO.

2. WDR ISSUES

In the absence of actual effluent analysis data, RWQCB staff applied a risk analysis model in setting the discharge standards based on hypothetical assumptions. This results in very stringent water quality requirements. In fact, the model as applied appears to prove that Basin Plan water quality objectives for drinking water present an unacceptable risk for human consumption.

Ecological and human health risk analysis have NEVER been used before in setting ground water discharge standards for disposal of domestic sewage. There is no demonstrable contact route between the constituents in the effluent that is discharged into the ground and ecological or human receptors. There is no direct discharge to surface waters with aquatic life and none of the surface waters are impacted by the discharge. Neither has the staff put forward a rationale for this significant change in policy for which there is no basis in the Basin Plan or precedent in other regions, SDRWCQB policies or guidelines. Thus, this appears to be an arbitrary and capricious application of risk analysis by RWQCB staff.

Board staff has required that these very stringent standards be confirmed by sampling PRIOR to the water entering the ground. Sample data collected prior to the water entering the ground has never previously been used as the measure of compliance because the Basin Plan recognizes that the soil's assimilative capacity acts as part of the treatment train. (See Basin Plan at 4-22 and 4-23.) Again, staff has put forward no rationale for this unprecedented and arguably arbitrary and capricious interpretation of the Basin Plan.

All three of EMCA's experts have concluded that the current system can not achieve the discharge standards required by the WDR. Thus, the logical conclusion is that RWQCB staff intended that the system will have to be shut down and replaced by a new system such as the "toilet to tap" system developed here in San Diego or by a hook up to sewer. The Basin Plan and the Water Code (sec 13280 and 13241) require that when setting water quality objectives and discharge requirements for subsurface disposal systems that the Regional Board consider:

1. The past present and probable future beneficial uses of water
2. The assimilative capacity of the receiving environment
3. Environmental characteristics of the hydrographic unit under consideration including the quality of water available thereto
4. Water quality conditions that could reasonably be achieved through the coordinated control of all factors which affect water quality in the area.
5. Economic considerations

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6. The need for developing housing within the region.

While the order says that these factors were considered, there is no evidence in RWQCB's file that this was ever done. Again there is no apparent basis for finding 23 other than the arbitrary opinions of RWQCB staff.

The Order claims to be exempt from CEQA because this is simply the permitting of an existing system. This flies in the face of reality because the system can not achieve the discharge standards of the WDR. Thus, the order is subject to a CEQA analysis prior to approval by the board.

San Diego Regional Board Policy requires that hookup to a sanitary sewer be shown to be infeasible BEFORE issuing a WDR for a community septic system. This was obviously not done. Because of unsubstantiated findings and arbitrary application thereof in this WDR, it can not rationally provide the legal basis for the accompanying CDO.

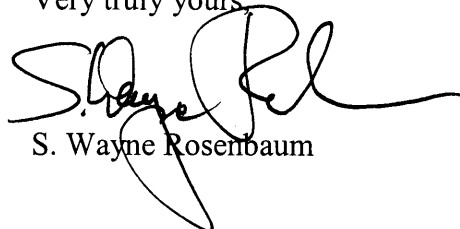
3. **POLICY ISSUES**

The application of basin plan requirements to permits with common fact patterns (same pollutant, same beneficial uses, etc.) has always been considered to be presidential. This is only logical because to do otherwise would constitute prima facie evidence that the board acted in an arbitrary and capricious manner in approving one permit over another. Here, the permit is completely outside the norm of other WDRs issued by this regional board or any other.

Assuming that this WDR represents a new higher standard of care that will be carried forward in all future WDRs for community on site waste water systems, the outcome would be to effectively ban such systems anywhere in the region. This would fly in the face of Water Code Section 13280 which requires that a denial of a WDR for a subsurface disposal system be supported by SUBSTANTIAL evidence that the system result in a violation of water quality objectives etc. and that all of the five considerations listed above were analyzed prior to the denial.

Based on the above, we again request that these issues be responded to in SDRWQCB staff's response to comments prior to the next Wednesday's board meeting or, in the alternative, that the orders be remanded to staff for further consideration of both the discharge standards imposed by this order and the alternative of requiring that DPR provide sanitary sewer to the residents at the resident's cost.

Very truly yours,



S. Wayne Rosenbaum

cc: John Richards